

SECTION ---- DISADVANTAGED BUSINESS ENTERPRISES

DISADVANTAGED BUSINESS ENTERPRISE PROVISIONS

1.0 Policy and Obligation

- 1.1 Policy -- It is the policy of the Virginia Department of Transportation (Department) and the United States Department of Transportation (DOT) that Disadvantaged Business Enterprises (DBEs), as defined herein and in the federal regulations published at 49 CFR Part 26, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds. Consequently, the DBE requirements of 49 CFR Part 26 apply to this contract.
- 1.2 DBE Obligation -- Bidder agrees to ensure that DBEs have the maximum opportunity to participate in the performance of the Department's contracts and subcontracts. In this regard, the Bidder shall take all necessary and reasonable steps in accordance with these provisions and 49 CFR Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform contracts. Bidders shall not discriminate on the basis of race, color, sex, or national origin, in the award or performance of DOT-assisted contracts.

2.0 DBE Goal

- 2.1 The Department has established a goal for participation by DBEs of _____% of the total contract value.
- 2.2 Only DBEs who meet the definitions contained in Section 3.0 of these provisions and who have been certified by the Department of Minority Business Enterprise prior to contract award may be credited toward the goal.
- 2.3 Work that is performed by a DBE prime contractor shall be counted towards the contract goal for DBE participation. In most cases, this means that a DBE bidder on a prime contract will meet the contract goal by virtue of the work it performs on the prime contract with its own forces.

For example, suppose DBE Firm X is the apparent low bidder on a prime contract with a 10 percent contract goal. Firm X will perform 30 percent of the work on the contract with its own forces (the minimum possible if a DBE is to perform a commercially useful function. This means that 30 percent of the contract amount counts toward the DBE contract goal. This

exceeds the 10 percent contract goal. Therefore, Firm X meets the contract goal. (In this example, the entire 30 percent DBE participation on the contract would be counted as race-neutral participation, since Firm X obtained the contract solely on the basis of its low bid.)

For the purposes of VDOT contracts, refer to the following method to determine DBE participation. In calculating the total DBE percentage, only the total dollar value either the prime contracts or subcontracts to be awarded to firms owned and controlled by DBEs may be counted towards meeting the DBE goal.

3.0 Definitions

The following definitions apply to the terms as used in these provisions.

- 3.1 "Disadvantaged Business Enterprise (DBE)" means a small business concern: (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly-owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- 3.2 "Small Business Concern" means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto, except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of \$17.4 million over the previous three fiscal years.
- 3.3 "Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans, women and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act, or by the Department pursuant to 49 CFR Part 23.62. Members of the following groups are presumed to be socially and economically disadvantaged:
 - 3.3.1. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

- 3.3.2. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- 3.3.3. "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- 3.3.4. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia or Hong Kong;
- 3.3.5. "Subcontinent-Asian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh; Bhutan, the Maldives Islands, Nepal, or Sri Lanka.
- 3.3.6. Women, regardless of ethnicity or race.
- 3.3.7. Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.
- 3.4 "Owned and Controlled" means a business: (a) which is at least 51 percent owned by one or more "Socially and Economically Disadvantaged Individuals" or, in the case of a publicly-owned business, at least 51 percent of the stock of which is owned by one or more "Socially and Economically Disadvantaged Individuals"; and (b) whose management and daily business operations are controlled by one or more such individuals.
- 3.5 "Manufacturer" means a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the contractor.
- 3.6 "Regular Dealer" means a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. The firm must engage in, as its principal business, and in its own name, the purchase and sale of the product in question. A regular dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment.
- 3.7 "Other Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States (or lawfully

admitted permanent residents) and who, on a case-by-case basis, are determined by Small Business Administration or the Department to meet the social and economic disadvantage criteria described below.

3.7.1. Social Disadvantage

- 3.7.1.1 The individual's social disadvantage must stem from his/her color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause beyond the individual's control.
- 3.7.1.2 The individual must demonstrate that he/she has personally suffered social disadvantage.
- 3.7.1.3 The individual's social disadvantage must be rooted in treatment, which he/she has experienced in American society, not in other countries.
- 3.7.1.4 The individual's social disadvantage must be chronic, longstanding and substantial, not fleeting or insignificant.
- 3.7.1.5 The individual's social disadvantage must have negatively affected his/her entry into and/or advancement in the business world.
- 3.7.1.6 A determination of social disadvantage must be made before proceeding to make a determination of economic disadvantage.

3.7.2. Economic Disadvantage

- 3.7.2.1 The individual's ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same line of business and competitive market area that are not socially disadvantaged.
- 3.7.2.2 The following criteria will be considered when determining the degree of diminished credit and capital opportunities of a person claiming social and economic disadvantage:

With respect to the individual:

- availability of financing

- bonding capability
- availability of outside equity capital
- available markets

With respect to the individual and the business concern:

- personal and business assets
- personal and business net worth
- personal and business income and profits

4.0 Bidders' Obligation

4.1 Bidders' DBE Commitment -- Bidders shall identify in their Bid (on the LIST OF PROPOSED DBEs), all of the DBEs identified to participate in the project, regardless of their percent of participation. The LIST OF PROPOSED DBEs shall be completed as follows:

- 4.1.1 The Bidder shall identify how DBE firms will participate in this project. The DBE goal may be satisfied by a commitment to DBE participation in the contract as a subcontractor, trucker, or supplier.
- 4.1.2 The Bidder shall list the name of each DBE subcontractor, trucker, or supplier, which the Bidder intends to credit toward the DBE goal. The Bidder shall identify, on the form, the complete legal business name of each DBE subcontractor, as it appears on the DBE certification form.
- 4.1.3 The Bidder shall identify the primary location of business for each DBE subcontractor identified.
- 4.1.4 The Bidder shall list the items of work to be performed, or materials supplied, by each DBE.
- 4.1.5 The Bidder shall state each DBE's participation in the contract, expressed as an estimated dollar value.
- 4.1.6 The Bidder shall state the estimated percent of the total bid for each DBE on the DBE subcontractor form. The percentage allocated for each DBE must be in accordance with the following provisions:
 - 4.1.6.1 A DBE must perform a commercially useful function, that is, must be responsible for the execution of a

distinct element of the work and must carry out its responsibility by actually performing, managing and supervising the work. In light of standard industry practices and other relevant considerations, the DBE must have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the DBE Program.

4.1.6.2

Credit for the participation of DBE vendors of materials and supplies is to be counted as follows:

- 60 percent of expenditures for materials and supplies required under the contract and obtained from a "regular dealer" as defined in Section 3.6 above.
- 100 percent of expenditures for materials and supplies obtained from a DBE "manufacturer" as defined in Section 3.5 above, or from a DBE supplier who substantially alters the material before resale.

4.1.6.3

The following types of fees or commissions paid to DBE consultants, brokers, and packagers may be counted toward the goal, provided that the fee or commission is reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.

- The fees or commissions charged for providing a bona fide service such as professional and technical, or procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract.
- The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials or supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of, or a regular dealer in, the materials and supplies.
- The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract.

- 4.1.7 The Bidder shall state the total estimated dollar participation for all DBEs.
- 4.1.8 The Bidder shall state the total estimated participation for all DBEs expressed as a percentage of the total bid price. These totals shall include the sum of the following:
 - 4.1.8.1 The value of all proposed DBE subcontracts.
 - 4.1.8.2 The dollar value of all materials and supplies to be provided by DBEs (to be credited as noted in Section 4.1.8 above).
- 4.1.9 Bidders List. Incorporated in the new regulations is the requirement that all vendors, both primes and subcontractors who intend to submit a bid sign a Bidders List. This list must be completed by each vendor in detail as the information is sent to the Federal Highway Administration to better track DBE outreach efforts. A copy of the bidders List is attached to the back of this IFB

4.2 DBE Goal Attainment

- 4.2.1 Bidder must have either:
 - 4.2.1.1 Met the DBE goal set forth in Section 2.0 above; or
 - 4.2.1.2 If the goal was not met, satisfy the Department that it exercised good faith efforts to meet the goal by attaining **a minimum of 70 points** of the good faith efforts listed in 4.3 and 4.4, below.
- 4.2.2 Documentation of a Bidder's good faith efforts must be submitted to the Department within three working days after request by the Department.
- 4.2.3 A Bidder shall be deemed to have exercised good faith efforts only if the Bidder satisfies the Department that it literally complied with the good faith efforts enumerated in Section 4.4, below.
- 4.2.4 A Bidder shall complete and submit with the Bid, the good faith effort documentation referenced in Section 4.3 below, if the DBE goal is not met.

- 4.3 Good Faith Efforts -- To be determined responsive, a Bidder who fails to meet the DBE goal must present evidence to satisfy the Department that the Bidder has met a minimum of 70 points towards the good faith effort, as enumerated below. Literal compliance in the exercise of these good faith efforts is mandatory. The following are the minimum required good

faith efforts, the Department's criteria and assigned point value for each good faith effort, and the types of documentation necessary to evidence such efforts.

4.3.1 Attendance at pre-proposal (pre-bid) meeting(s) scheduled by Department to inform prospective competitors and DBE's of contracting and subcontracting opportunities **(4 points)**;

4.3.2 The Bidder shall have advertised in at least one newspaper of general circulation, at least one trade association publication, **and** at least two minority focused media. The advertisements shall be placed in the business, classified or request for sub-bid section. The initial advertisement shall appear in these publications no later than twenty calendar days prior to the originally specified bid opening date. A list of minority focus newspapers may be obtained from the Department's Small Business Program.

4.3.2.1 Advertisements shall include at a minimum the following information:

- project name and location;
- indication of Department as owner;
- location where plans and specifications may be obtained or viewed;
- sub-bid due date;
- trades or scopes of work for which sub-bids are being solicited;
- statement that bid solicitation is in response to the Department DBE Program; and
- statement that Bidder intends to seriously negotiate with DBE firms for participation on the project.

4.3.2.2 Documentation -- Proof of publication or copies of tear sheets, showing dates and names of publications **(8 points)**.

4.3.3 The Bidder shall have selected portions of the work for which interest from DBEs was solicited in a manner to increase the likelihood of achieving the stated goals. When economically feasible, the Bidder shall have divided work into small tasks or quantities to permit maximum participation of DBE businesses.

To be competitive in the face of a DBE goal specification, a Bidder with total in-house manufacturing capabilities may have to try to subcontract out various functions or components which the Bidder could otherwise do or furnish itself. Good faith effort constitutes comparing prices from DBEs to those of other non-DBEs in the same trade or industry, and not solely to those of the Bidder.

4.3.3.1 Documentation -- Submit a list of work items and estimated dollar value of each item. Separate work, which the Bidder intends to perform with its own work force apart from areas of work which the Bidder, identified for DBE participation. State whether or not the Bidder gave consideration to dividing the contract into economically feasible units of work. If this was not done, explain why it could not be done **(13 points)**.

4.4 The Bidder shall have extended written invitations to bid to at least (1) DBE no later than 20 calendar days prior to the Department's originally specified bid due date. The Department will credit toward this threshold only the following DBEs:

- DBEs certified by the Department of Minority Business Enterprise on or before the contract/purchase order execution date;

The invitation/solicitation shall provide at least the following information:

- Date of correspondence, invitation/solicitation;
- Project name and location;
- Indication of the Department as owner;
- A description of work for which bids/proposals are being solicited;
- Copies of technical specifications or information where plans and specifications may be obtained or viewed;
- Sub-bid/proposal due date;
- Statement that solicitation is in response to the Department's DBE Program; and

- Statement that Bidder intends to seriously consider and negotiate with capable, competitive DBE firms for participation in the contract.

4.4.1 Documentation -- A list of DBE firms which the Bidder identified to solicit interest in the contract. Identify the source of this list (i.e., DMBE, Minority Contractor Associations, Minority Trade Associations, etc). Copies of letters, Request for Bids/Proposals, mail receipts, addressed postcards sent to DBEs **(18 points)**.

4.4.5 The Bidder shall have followed-up orally or in writing with all DBE firms who were initially sent the invitation/solicitation described in good faith effort above, by evidence of attempting to contact them to determine with certainty whether they were interested in submitting a sub-bid, quotation, or proposal, and the response by the DBE firms.

4.4.5.1 Documentation -- A written record of any oral follow-up is required. Records which can be verified to document contact with these DBE firms (e.g., letters; minutes or notes of meetings held with DBE firms; copies of correspondence [including undeliverable mail] to and from DBE's, solicitation call sheets or telephone logs) **(16 points)**. This documentation must reflect the following:

- Name and address of firm contacted.
- Person contacted, telephone number (if follow-up is by phone), and date contacted.
- Response from these firms as to their interest in bidding on the contract.

4.4.6 The Bidder shall have outreached to DBEs through minority and women contractor, trade and professional associations at least 20 calendar days prior to the specified bid opening/proposal submittal date. Notices to these associations shall include at least the same information listed in good faith effort.

4.4.e. (1) Documentation - Records or correspondence which confirm notification to the associations, and any response thereto **(10 points)**.

4.4.7 The Bidder shall have assisted DBEs, who requested assistance in obtaining lines of credit or bonding, if the Bidder required bonding.

4.4.7.1 Examples of assistance are:

- contact bonding companies, lenders, on behalf of the DBE firm;
- arrange with sureties incremental or phased bonding for the DBE;
- pay for the cost of the bond;
- waive bonding requirements; and/or
- refer the DBE to Business Development Centers or other resource agencies who may assist DBE in obtaining bonding or lines of credit as referenced in good faith effort 4.4.e. above.

4.4.7.2 Documentation -- If the Bidder required bonding, etc., provide a list of DBEs who requested assistance in these areas and any assistance provided by the Bidder; or a statement of the Bidder's decision to waive bonding requirements **(6 points)**.

4.4.8 The Bidder shall provide adequate information about plans, specifications, scope of work, and/or contracting.

4.4.8.1 Documentation – Lists of the DBEs contacted, names of people contacted, and types of information provided to the potential subcontractors **(14 points)**

4.4.9 The Bidder shall have negotiated in good faith with interested, capable and competitive DBEs, not rejecting DBEs as unqualified without sound reasons.

4.4.9.1 Documentation **(11 points)**:

- Correspondence between the Bidder and DBEs;
- Internal logs, forms, or memoranda used by the Bidder to record communication between the Bidder and DBEs concerning the DBE's participation in the contract, terms and conditions

of their participation, the scope of work to be bid by DBEs;

- Telephone quotations and follow-up written subbids from DBEs to confirm their verbal quote.
- A chart summarizing the outcome of the Bidder's efforts to negotiate in good faith with interested DBEs. This chart shall contain the following information for each DBE responding:
 - Name of DBE;
 - Work items or scope of work bid;
 - Dollar amount of bid or proposal;
 - If negotiations were held but no contract resulted, reasons therefore; and
 - If the Bidder rejected sub-bid/proposal, reasons therefore.

4.5 DBE Certification

4.5.1 DBE firms need not be certified as of the bid date, but must be certified prior to contract award.

4.5.2 A current DBE list may be obtained on-line at www.DMBE.state.va.us, or by contacting:

Department of Minority Business Enterprise
200-202 9th Street, 11th Floor
Richmond, Va. 23219
(804) 786-8565

4.5.2.2 This list does not represent all DBEs available in the trade or specialty areas required by this contract, but merely those firms that have applied to the DMBE and have been granted certification.

4.5.3 Application for certification by the DMBE may be obtained by submitting Uniform Certification Application (for individual, business concerns). This form is attached hereto.

- 4.5.3.1 Within five working days of request by the Department, a Bidder shall cause each of its purported DBE firms not currently certified by the DMBE to submit to the Department information to confirm DBE status. Each firm applying for certification shall submit Uniform Certification Application with the required supporting documentation.
 - 4.5.3.2 If the Bidder is a DBE, the firm should have current DBE status with the DMBE.
 - 4.5.3.3 All DBE certifications must be final by the due date of the bid in order to counted for DBE goal participation.
- 4.6. "FRAUDS" and "FRONTS" -- Bidders are hereby cautioned against knowingly and willfully using "fronts" to meet the DBE goal of this contract. Only legitimate DBEs are eligible to participate in any federally funded contract. The use of "fronts" and "pass through" subcontracts to non-disadvantaged firms constitute criminal violations. Any indication of fraud, waste, abuse or mismanagement of federal funds should be immediately reported to the Department or to the Office of Inspector General, U.S. Department of Transportation at (757-455-2529), or to the following field office: FHWA Special Agent-in-Charge, 150 Corporate Blvd, Norfolk, Virginia 23502.

5.0 Contractor's Obligation

- 5.1 During the term of the contract/purchase order, the contractor shall continue to make good faith efforts to ensure that DBEs committed to in the bid have maximum opportunity to successfully perform in the contract, and that the contractor meets the DBE goal. These efforts shall include but not be limited to the following:
 - 5.1.1 Negotiating in good faith to attempt to finalize and execute a subcontract agreement with the DBEs committed to in the Bid.
 - 5.1.2 For contractors who fell short of meeting the DBE goal set for this contract, but who were determined by the Department to have made good faith efforts to meet the goal, exerting efforts that can be documented to seek out and utilize additional DBE suppliers and DBE subcontractors whose participation is less than 1/2 of one percent of the contract value, to make up for the shortfall.
 - 5.1.3 Continuing to provide assistance to DBE subcontractors or suppliers in obtaining bonding, lines of credit, etc., if required by the contractor.

- 5.1.4 Notifying a DBE in writing of any potential problem and attempting to resolve the problem prior to formally requesting Department approval to substitute for the DBE subcontractor.
- 5.1.5 As with all subcontractors, timely payment of all monies due and owing to DBE subcontractors and suppliers.
- 5.1.6 Timely submittal of complete and accurate DBE monthly reports in accordance with Article 5.3 below.
- 5.1.7 Alerting the Department's Civil Rights Office in a timely manner of any problems anticipated in attaining the DBE participation goal committed to in the bid.
- 5.2 Substitution of Subcontractors -- If a contractor requests a substitution of DBE subcontractors or suppliers, the contractor shall exert good faith efforts to replace a DBE subcontractor with another DBE subcontractor, subject to the approval of the Department.
- 5.3 Contract Compliance Reporting Requirements -- The contractor shall submit monthly progress reports to the Department, in conformance with the currently approved schedule, reflecting its DBE participation. The Summary Subcontracts Award and Paid Report shall be submitted monthly to comply with this reporting requirement.
- 5.4 Change in Contract Amount -- The dollar amount of change orders, or any other contract modifications that increase or decrease the work area in which DBE's participation has been committed to in the bid, shall be commensurately added to, or subtracted from, the total contract base figure used to compute actual dollars paid to DBEs. Revised total contract dollar values shall be reflected in the monthly progress report submitted to the Department and referenced in Section 5.3 above.
- 5.5 Noncompliance -- Failure to carry out the requirements of these provisions constitutes a breach of contract that may result in termination of the contract by the Department or imposition of other appropriate administrative sanctions. This notice is given pursuant to 49 CFR Part 26.101(a).